



July 23, 2007

**VIA OVERNIGHT MAIL**

Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

**Re: In the Matter of Level 3 Communications, LLC's Petition For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms and Conditions of Interconnection with Qwest Corporation**

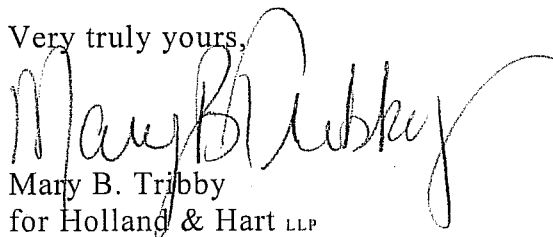
**Docket No.: TC06-007**

Dear Ms. Van Gerpen:

Enclosed please find an original and ten (10) copies of Level 3 Communications, LLC's Reply Comments regarding the above-referenced matter which we previously e-filed on July 23, 2007.

If you have any questions, please do not hesitate to call the undersigned at 303-295-8461 or Richard Thayer at Level 3 Communications.

Very truly yours,



Mary B. Tribby  
for Holland & Hart LLP

MBT:sc

Enclosures

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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION.</b>	<b>Docket No.: TC06-007</b>
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**LEVEL 3 COMMUNICATIONS, LLC'S COMMENTS IN REPLY TO QWEST  
CORPORATION'S RESPONSE FILED ON JULY 2, 2007**

Qwest Corporation ("Qwest") has filed a Response to the Reply Filed by Level 3 Communications, LLC ("Level 3"). Qwest's Response essentially argues that it has no legal or equitable obligation to continue to offer a current Statement of Generally Available Terms and Conditions ("SGAT") in South Dakota. Qwest asks the Commission to deny Level 3's request that Qwest update its SGAT to reflect the current law and allow Level 3 to opt into that SGAT. In providing these Comments, Level 3 incorporates herein the arguments made in its Reply Comments filed in this docket on May 31, 2007.

**I. Having Chosen to File and Rely upon an SGAT in South Dakota, Qwest has no Authority for Withdrawing it Now.**

The primary thrust of Qwest's argument is that the law does not obligate it to offer an SGAT at all. Therefore, Qwest apparently believes, it may unilaterally withdraw its SGAT, once offered, at any time without Commission approval. Qwest cites no authority whatsoever in support of this position, and Level 3 is aware of none.

Level 3 does not quarrel with Qwest's argument that an SGAT is a voluntary offer under Section 251 of the Federal Telecommunications Act of 1996. However, once Qwest has chosen

to offer an SGAT in South Dakota, and the Commission has adopted and relied upon it, Qwest may not withdraw the SGAT without Commission approval. Further, in ruling on such a request, the Commission is entitled to require Qwest to continue to offer an updated SGAT, with all of its attendant benefits for competition, as outlined in Level 3's May 31 Reply Comments. Qwest has cited to no law or policy to the contrary.

**A. This Commission Has Not Approved Qwest's Withdrawal of its SGAT; Thus Qwest's Obligation to Offer the SGAT Continues.**

Qwest claims that:

- it "stopped allowing CLECs to adopt the [latest] SGAT" in May 2005 (Response, p. 5);
- it has "stopped offering the [latest] SGAT" (Response, p. 8);
- it "no longer offers the [latest] SGAT" (Response, p. 8);
- it "ceased offering the 2002 SGAT in 2005" (Response, p. 8); and
- the "2002 SGAT is no longer available" (Response, p. 9).

Despite each of these claims, however, it also acknowledges that it only recently, on June 15, 2007, and **only after Level 3 had requested to opt into the SGAT**, filed with the Commission seeking permission to withdraw its SGAT. (Response, p. 5). By its June 15 filing, Qwest appears to acknowledge that it does not have the right to unilaterally withdraw its SGAT, but requires Commission approval to do so. The Commission has not yet given that approval. How then, could Qwest have lawfully taken the unilateral actions described above to deny CLECs access to the SGAT in South Dakota? It could not have. And those actions, as well as its latest denial of Level 3's request to opt into the SGAT currently in effect in South Dakota, are unlawful.<sup>1</sup>

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<sup>1</sup> See e.g., *In Re: BellSouth's Withdrawal of its Statement of Generally Available Terms and Conditions*, Docket No. 04-00261, Tennessee Regulatory Utility Commission, 2005 Tenn. PUC

**B. Qwest Represented to the Commission That It Would Update its SGAT to Reflect Current Law.**

As Qwest admits in its Response, it has already prepared and filed with the South Dakota PUC a TRO-compliant SGAT. It made this filing on February 20, 2004. (Response, p. 3). After the TRO was appealed and the decision vacated, Qwest moved to withdraw its revised SGAT on March 18, 2004. The Commission granted the motion on April 19, 2004.<sup>2</sup> In making its filing requesting withdrawal of its 2004 SGAT, however, Qwest represented to the Commission that it would either resubmit the updated SGAT or submit a new SGAT following the D.C. Circuit Court's decision. Qwest has done neither. Nor did Qwest represent to the Commission at that time that it might simply choose to deem its prior SGAT expired. Thus, any action other than continuing to offer an updated SGAT is inconsistent with Qwest's prior commitments to the Commission.

**II. Contrary to Qwest's Arguments, the SGAT has not "Expired."**

Qwest attempts to argue that its South Dakota SGAT has "expired" by virtue of its own terms. Response, p. 9. However, as even Qwest acknowledges, the SGAT operates as an "offer" to CLECs. *Id.* Once a CLEC has agreed to the SGAT or some version of it, that CLEC's resulting agreement with Qwest is in the form of an interconnection agreement. Only that resulting interconnection agreement has a self-executing expiration date in sections 5.2.1 and

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LEXIS 149 (June 27, 2005) (CLECs raise same objections regarding withdrawal of SGAT being raised herein by Level 3; because parties settled, however, Commission is relieved of making decision).

<sup>2</sup> See *In the Matter of the Filing by Qwest Corporation for Approval of Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services and Resale of Telecommunications*, Order Granting Motion to Withdraw Notice of Updated Statement of Generally Available Terms and Conditions and Statement of Compliance, TC04-037, April 19, 2004.

5.2.2. The SGAT has no such provision, making any argument that the 2002 SGAT expired in 2005 by its own terms unsupportable.

**III. It Would Not Be Burdensome for Qwest to Update the SGAT, But Would Be Unfair to Force Level 3 to Opt Into Another Agreement.**

Qwest intimates throughout its Response that it would be burdensome to update its SGAT. It argues that its SGAT does not reflect changes in law in either the TRO or the TRRO (Response, p. 8) although it argues in the same response that the SGAT has at least been updated to reflect the changes in the TRO. (Response, p. 3). In any event, Qwest asserts that it has a template interconnection agreement and interconnection agreements with other carriers in South Dakota that are up to date and to which Level 3 could easily opt into. (Response, p. 4). If that is the case, incorporating the same changes into the SGAT that Qwest has already made to its template agreement and its agreements with other carriers could hardly amount to a complex task.

While Level 3 does not object to Qwest taking the time to update its SGAT prior to Level 3 opting into it so that it reflects current law, the Commission should be aware that any updating will be for the benefit of Qwest, not Level 3. In other words, the latest legal changes which Qwest wishes to reflect in the SGAT that came out of the TRRO all diminish Qwest's legal obligations to CLECs rather than enhance or increase them. Therefore, the 2002 SGAT as it currently exists is legally compliant because there is no legal impediment to Qwest offering CLECs more than the law obligates it to provide. Nevertheless, Level 3 does not object to Qwest taking the time to update its SGAT to reflect current law, as long as Level 3 and other carriers retain the right to seek Commission resolution regarding any disputes about what the current law actually requires.

Instead of updating its SGAT, Qwest argues that Level 3 may simply opt into either Qwest's template agreement or one of the interconnection agreements already in place in South Dakota. (Response, p. 9). Qwest argues further that these agreements all have the benefit of Commission "review and approval." Response, pp. 4, 9. First, the template agreement certainly has not had the benefit of Commission review or approval. As for the interconnection agreements with other carriers in the state, Level 3 has no idea whether any of those were actually "reviewed and approved" by the Commission or whether they were simply deemed approved by the passage of time. Further and significantly, the standard for approval of agreements adopted by voluntary negotiation under 47 U.S.C. § 252(a)(1) need not satisfy the requirements of section 251 as an SGAT is required to do. Thus, the standard is much different for approval of those agreements. Negotiated agreements and Qwest's template agreement do not have the benefit of industry-wide participation which allows an SGAT to satisfy the needs of the broadest array of carriers who might opt into it. This is precisely why an SGAT is such a competition-promoting tool, and one which this Commission is well within its legal rights to continue to require.

#### **IV. This Commission Relied on Qwest's SGAT in Recommending 271 Approval.**

Although Level 3 agrees that Qwest filed for 271 approval under Track A in South Dakota, the Commission and the FCC expressly reviewed and relied upon Qwest's SGAT and its offerings therein in recommending approval of Qwest's application.<sup>3</sup> Given the significant

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<sup>3</sup> See *In the Matter of the Application by Qwest Communications Int'l, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, Before the Federal Communications Commission, WC Docket No. 03-11, Comments and Reply Comments of the Public Utilities Commission of South Dakota (February 4 and 23, 2003); Memorandum Opinion and Order (April 15, 2003).

financial and competitive gains by Qwest since it received long distance approval,<sup>4</sup> it should not, having now received those benefits, back away from the commitments it previously made to this Commission and Qwest's competitors. Even though Qwest may not be obligated to offer an SGAT to gain 271 relief, once it chooses to do so and reliance is placed upon it, Qwest should not be allowed to unilaterally withdraw it without notice to unsuspecting CLECs. This is particularly true for CLECs like Level 3 who requested the ability to opt into the SGAT before Qwest moved to withdraw it from availability in South Dakota.

**V. Even if the Commission Does Not Require Qwest to Continue to Offer Its SGAT in Perpetuity, It Should Not Allow Withdrawal Without Notice to CLECs and the Expiration of a Reasonable Period of Time.**

The SGAT enhances and eases competition in any state. It benefits from Commission oversight and approval and from required compliance with Federal Act and state law requirements. It provides a standard, approved offering which decreases or even eliminates the significant transaction costs that are incurred in negotiating and then arbitrating, if necessary, an interconnection agreement with Qwest. These benefits do not exist with the use of either a template agreement or adoption of another carrier's negotiated interconnection agreement. Level 3 believes these benefits are substantial, and that once Qwest decided to offer its SGAT and at least partially rely upon it for 271 relief, that the Commission has the authority to require Qwest to continue to maintain an updated SGAT available for opt-in in South Dakota.

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<sup>4</sup> For example, at the same time Qwest was apparently unilaterally pulling the SGAT rug out from under CLECs in May 2005, it was telling the investor community in August of 2005 that its consumer long distance revenues were up 30% from the prior year and that its penetration rate into the long distance market was almost 40%. Its latest first quarter 2007 results released on May 1, 2007 indicate that such penetration continues to increase, and that its bundled penetration is now at 59%.

Even if the Commission does not believe, however, that the law allows it to require Qwest to maintain an updated SGAT in perpetuity, it should still not allow Qwest to withdraw its SGAT at this point in time. Level 3 requested the ability to opt into Qwest's SGAT before Qwest made any request that it be withdrawn. Before the Commission approves that request, any argument by Qwest that the SGAT is unavailable or has been unilaterally withdrawn should be ignored. Not only should Level 3 be allowed to take advantage of a current SGAT in South Dakota, which Qwest can admittedly update with little effort, but all other CLECs operating in South Dakota should have the opportunity to participate in any proceedings reviewing or challenging that update. Those carriers should also have the ability to opt into the updated SGAT once it is current and any proceedings have been completed. Through that process the Commission can be assured that the SGAT is available to all competitors until sufficient notice has been given that it will no longer be available, and that the updated SGAT has benefited from the input of all interested parties. That procedure will also guarantee that the Commission has provided adequate opportunity for all competitors who wish to participate to do so, and that it has done what it can to continue to enhance and promote meaningful competition in the telecommunications marketplace in South Dakota.

WHEREFORE, Level 3 respectfully requests that the Commission require Qwest to file for approval an updated SGAT which any competitor may opt into under 47 U.S.C. §§ 252(f) and (i). Level 3 further requests that all carriers operating in South Dakota have the opportunity to participate in the approval process regarding the SGAT. Further, Level 3 requests that the Commission order Qwest to allow Level 3 to continue to operate under its current interconnection agreement until an updated SGAT has been submitted and approved by the Commission. Finally, Level 3 requests such further relief as the Commission deems appropriate.



Respectfully submitted this 23 day of July, 2007.

By: Mary B. Tribby  
Mary B. Tribby, #22788  
HOLLAND & HART LLP  
555 17th Street, Floor 32  
Denver, CO 80202  
303-295-8000  
Attorneys for Level 3  
Communications, Inc.

Richard E. Thayer  
Erik Cecil  
LEVEL 3 COMMUNICATIONS, LLC.  
1025 Eldorado Boulevard  
Broomfield, Colorado 80021  
Attorneys for Level 3  
Communications, Inc.

**CERTIFICATE OF SERVICE**

This is to certify that on July 23, 2007, a true and correct copy of the foregoing was E-Filed upon the following party:

Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

and copies sent via U.S. mail, addressed to the following:

David A. Gerdes  
May, Adam Gerdes & Thompson,  
LLP  
503 South Pierre Street  
P. O. Box 160  
Pierre, SD 57501-0160

Thomas M. Dethlefs  
Qwest Corporation  
1801 California  
10th Floor  
Denver, CO 80202

Jason D. Topp  
Qwest Corporation  
200 South 5th Street  
Room 2200  
Minneapolis, MN 55402

Colleen E. Sevold  
Manager-Regulatory Affairs  
Qwest Corporation  
125 South Dakota Avenue  
8th Floor  
Sioux Falls, SD 57194

Ted Smith  
Stoel Rives LLP  
201 South Main Street  
Suite 1100  
Salt Lake City, UT 84111

By: \_\_\_\_\_

Susie Curtis